

VIA E-FILING

January 2, 2019

Mr. Blake A. Hawthorne, Clerk
HON. SUPREME COURT OF TEXAS
P.O. Box 12248
Austin, Texas 78711

RE: *Appeal No. 17-0552: Texas Dep't of Crim. Justice v.
Maurie Levin, Naomi Terr and Hilary Sheard.*

TO THE HONORABLE SUPREME COURT OF TEXAS:

On behalf of the death penalty lawyers (respondents), I write in advance of oral argument (January 23, 2019) to inform the Court of an important recent development. As the Court knows, the crux of TDCJ's argument is that violence will occur if the identity of the Lethal Injection Drug (LID) supplier is ever disclosed, even from three or more years ago.

*The Cat is Out of the Bag*¹

On November 28, 2017, an Internet investigative journalist published a news story identifying the source of Texas' LIDs for the past three and a half years. C. McDaniel, "Inmates Said the Drug Burned As They Died. This Is How Texas Gets

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¹ Or "container," "package," or "vessel." See *City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586, 596 (Tex. 2018)

Its Execution Drugs,” Nov. 28, 2018 (Last visited 12/27/18).
<https://www.buzzfeednews.com/article/chrismcDaniel/inmates-said-the-drug-burned-as-they-died-this-is-how-texas>

This journalist identified the Greenpark Compounding Pharmacy, in Houston, as where TDCJ “for the last three and a half years bought drugs for lethal injections from a pharmacy that regulators have repeatedly cited for dangerous practices.” *Id.* As the respondents feared when they filed this suit, the compounding pharmacy has a history of regulatory violations involving its pharmaceuticals. *Id.* As cited in a Houston Chronicle editorial by a faculty member of Harvard Medical School, Greenpark has been cited for “48 safety violations by the Texas State Board of Pharmacy and the Food and Drug Administration.” P. Yadav, “Texas pharmacies willing to put us all at risk,” HOUSTON CHRONICLE, Dec. 17, 2018:
<https://www.houstonchronicle.com/opinion/outlook/article/Texas-pharmacies-willing-to-kill-put-us-all-at-13473824.php?cmpid=gsa-chron-result>. It is the opinion of this editorial that increased secrecy (and, thus, accountability) jeopardizes health and safety.²

TDCJ has not denied that Greenpark was its supplier for the time identified. K. Blakinger, Houston Chronicle, Dec. 3, 2018:
<https://www.houstonchronicle.com/news/houston-texas/houston/article/We-don-t-do-it-As-protesters-gather-13440688.php> (last visited 12/28/18). The pharmacy has issued several different statements, telling *Buzzfeed* “It’s none of your business what I do” and also that it did not currently provide drugs to TDCJ (“I don’t do it.”).
<https://www.buzzfeednews.com/article/chrismcDaniel/inmates-said-the-drug-burned-as-they-died-this-is-how-texas> (last visited 12/31/18).

Greenpark has also stated that it only provided “drug testing” for TDCJ. H. Wiley, TEXAS TRIBUNE (Nov. 28, 2018):
<https://www.texastribune.org/2018/11/28/report-houston-based-pharmacy-supplier-texas-execution-drugs/> (last visited 12/28/18).

Most importantly for this appeal, after the news coverage, there was a day of protest, described by the Houston Chronicle as “peaceful” and where the protesters “stayed well-behaved.”

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² This Op-Ed also points out that the Oklahoma-based “Apothecary Shoppe” that provided drugs to Missouri (and was the subject of the email from Prof. Humez) has been cited for committing “1,892 violations of state pharmacy guidelines.” *Id.*

<https://www.houstonchronicle.com/news/houston-texas/houston/article/We-don-t-do-it-As-protesters-gather-13440688.php> (last visited 12/28/18). This, of course, both demonstrates that violence will not erupt and that any hoopla has already died-down. And, of course, if there is any further activity at this location, it will not be caused by this case or any action by the courts. Since the article was published there have been no acts of violence at Greenpark. Similarly, there has been no public statement that Greenpark has chosen not to continue to supply TDCJ with LIDs in the future because of this publicity.

In short, if Greenpark **is** the supplier at issue in this case, then their identity has been disclosed and this case adds nothing by being decided by this Court. If Greenpark **is not** the current supplier, then recent events confirm that there is not likelihood of a Substantial Threat of Physical Harm (STPH), as found (unanimously) by all the judges below. And, if Greenpark did supply TDCJ at one time in the past and ever chooses to do so again, its identity will be shielded under the 2015 amendment.

This new disclosure does not render this case moot, because plaintiffs still have a claim for attorney's fees and because there is not yet any confirmation that Greenpark was actually the supplier at the time of our TPIA request. *See Matthews, on behalf of M.M. v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 417 (Tex. 2016); *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 643 (Tex. 2005)(Hallman's remaining interest in obtaining attorney's fees "breathes life" into this appeal and prevents it from being moot.)(*citations omitted*).

On the other hand, since the facts involving our case cannot be repeated (because the change in the law now makes any future discourse impossible), the recent disclosure makes our case even more insignificant in terms of its precedential value or to the jurisprudence of Texas. As such, this Court might wish to consider, in light of these current developments, if the *rehearing* of its initial denial of the petition was improvidently granted.

Of course, if the Court has any other questions of the parties, please let us all know. And, here's to a happy and a healthy 2019.

This letter-brief has been e-filed with a copy to all counsel of record, as indicated below.

Respectfully submitted,

/s/ Philip Durst
Counsel for Respondents

c: *Mr. Ari Cuenin*
 Clients

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to all counsel of record herein ___ via hand delivery, ___ via regular mail, ___ via certified mail, return receipt requested, ___ via facsimile, ___x___ via electronic filing, _X_ via email, on this the 2nd day of January, 2019, to:

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